In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,
a California corporation,
Petitioner

vs.

MIDCAL ALUMINUM, INC., a California corporation,
Respondent

BAXTER RICE as Director of the Department of Alcoholic Beverage Control of the State of California,
Respondent

PETITIONER'S OPENING BRIEF

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JURISDICTION

The opinion of the Court of Appeal of California, Third Appellate District, was entered on March 26, 1979. The Court of Appeal denied a timely Petition for Rehearing on April 19, 1979. On May 24, 1979, the Supreme Court of California denied a timely Petition for Hearing.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

OPINIONS BELOW

The opinion of the Court of Appeal, entered March 26, 1979, is reported at 90 Cal.App.3d 979 (1979) (Appendix A, Pet. for Cert.) The Court of Appeal's denial of Petition for Rehearing was entered on April 19, 1979. The California Supreme Court's denial of Petition for Hearing was entered on May 24, 1979 (Appendix B, Pet. for Cert.)

STATUTORY PROVISIONS INVOLVED

The following constitutional provisions, statutes and rules are involved in this proceeding and are set forth in the Appendix to this brief as indicated:

QUESTIONS PRESENTED

The California Supreme Court in 1978 held that § 24755 of the California Alcoholic Beverage Control Act was invalid under the Sherman Antitrust Act. The California

Court of Appeal in this case, stating it was "bound" by that California Supreme Court ruling held that §§ 24862 and 24866 of the same Act were likewise invalid under the Sherman Act. The statutes involved require producers to set minimum wholesale and retail prices for their alcoholic beverages, post those prices with the State, require sales at no less than the posted prices and require enforcement of the provisions by the state agency charged by law with that duty under the regulatory act. The statutes are part of a broad, comprehensive act regulating the use, sale, possession and distribution of alcoholic beverages within the State of California. The questions presented are:

1. Does the Twenty-first Amendment confer upon a State the power to enact such regulatory statutes notwithstanding the Sherman Antitrust Act?

2. Does the "state action" exemption apply to the statutes and thereby place them outside the reach of the Sherman Antitrust Act?

STATEMENT OF THE CASE

California, like other States, has a comprehensive regulatory scheme which regulates all aspects of the alcoholic beverage industry in California from manufacturer through the retailer. The California Constitution, in Article XX, § 22, provides that:

> "The State of California, subject to the Internal Revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating

commerce between foreign nations and among the States shall have the exclusive right and power to regulate the importation into and the exportation from the State, of alcoholic beverages. In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages. . . ."[1]

The California Constitutional provision became effective on December 5, 1933, the same date as the ratification of the Twenty-first Amendment to the United States Constitution.

The California Legislature, shortly after the adoption of the California Constitutional provisions referred to, enacted an extensive and comprehensive statutory scheme for regulating alcoholic beverages within the State, and over the years since[2] has amended and repealed statutes and added new provisions.

In 1954, following extensive investigations by a legislative committee and the State Attorney General, of both the State Board of Equalization, and the liquor industry generally in California, and amid charges of bribery, corruption and of failure to enforce the provisions of the Act, the people amended Article XX, § 22, of the California Constitution and removed the Board of Equalization as the en-

[1]Thus, California is an "open" State as opposed to a "monopoly" State where the State itself exercises a "monopoly" (to a greater or lesser degree varying from State to State) and is itself in the business of selling and distributing alcoholic beverages to the exclusion of the private sector.

[2]The California Alcoholic Beverage Control Act (Act) is Division 9 of the California Business & Professions Code, beginning with § 23000, in Chapter 1, and extending through § 25763, in Chapter 17.

forcement agency. The Department of Alcoholic Beverage Control (Department) was created by this same amendment as was a new State agency to review decisions of the newly-created enforcement agency. These new State agencies came into being on January 1, 1955.[3]

Section 25750 of the Act provides that the Department of Alcoholic Beverage Control "shall make and prescribe such reasonable rules as may be necessary or proper to carry out the purposes and intent of § 22 of Article XX of the Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that section or by this division . . ."

The Board of Equalization before it, and the Department, since January 1, 1955, have promulgated various rules regulating alcoholic beverages.[4]

In addition to the statutes and rule relating to the setting of prices for wine at both the wholesale and retail level[5] which were specifically involved in the matter before the California Court of Appeal in this case, and the statute requiring the setting of prices for distilled spirits at the retail level[6] which was involved in an earlier California Supreme Court decision,[7] the Act contains numerous other provisions restricting, limiting and restraining the use, sale, delivery and possession of alcoholic beverages. Included are such matters as:

[3]Deering's California Codes Annotated, Constitution Article XX, § 22.

[4]See Title 4, California Administrative Code, Chapter 1, Rules 1 through 145.

[5]Sections 24862 and 24866 and Rule 101.

[6]Section 24755.

[7]*Rice v. Alcoholic Bev. etc. Appeals Board* (1978) 21 Cal.3d 431.

1. Restrictions on the number of retail on-sale and off-sale licenses (§§ 23816, 23817);

2. Tied-house restrictions generally separating the three levels of the industry from ownership ties (§§ 25500 through 25510);

3. Restrictions on advertising (§§ 25611.1, 25612);

4. Restrictions on discounts (§§ 24871, 24871.5, 24878);

5. Territorial restrictions and designations of trading areas (§ 25000.5, 24864);

6. Restrictions on the hours of operation of retail premises (§§ 25631 to 25633);

7. Limitations on credit and terms of payment between wholesalers and retailers (§ 25509).

In addition to these restrictions and restraints, other provisions of the Act require the seller of distilled spirits to retailers to set a selling price, post it with the Department and sell at that price (§ 24756). There is a similar statute with respect to the sale of beer from wholesale to retail (§ 25000).

By accusation dated August 15, 1978, the Department accused Midcal Aluminum, Inc., (MIDCAL) a wholesale distributor of wine,[8] of selling certain items of Gallo wine to a retailer "at prices less than the selling prices as posted in the then effective price schedule duly filed with the

[8]Dba Gallo Wine Co., an affiliate of E & J Gallo Winery, and the Southern California distributor of Gallo wine. (See Joint Appendix, pp. 39, 40 and 46.)

Department by E & J Gallo Winery."[9] Midcal was also accused of selling certain items of Gallo wine for which there was "no effective price schedule or an effective fair trade contract duly filed with the Department." The accusation alleged that these actions by Midcal constituted violations of § 24862 of the Act and Rule 101 of the California Administrative Code. Section 24862 prohibits the sale of wine by a licensee "except at the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract." The section further prohibits the sale to a consumer by a licensee of "any item of wine at less than the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract." . . .

Rule 101 contains the same basic requirements, and in addition, outlines the procedures to be followed by the licensees in complying with both the statutes involved and the rule.[10]

On the same date as the accusation, Midcal and the Department entered into a stipulation in which Midcal admitted "the truthfulness of the facts as set forth in the Accusation." Midcal further stipulated that "the Department may, subject to a judicial determination of the constitutionality of § 24850, et seq. Business & Professions Code and Rule 101 of Chapter 1, Title 4, California Administrative Code, impose a monetary penalty or suspension of Respondent's licenses . . ."[11]

[9]See Joint Appendix, p. 16.

[10]See Appendix to Pet. Brief, p. A-7.

[11]See Joint Appendix, p. 19.

On August 18, 1978, Midcal filed a petition for writ of mandamus in the Court of Appeal in California, seeking to compel the Department "to dismiss the Accusation" against it and "to cease enforcement of the wine price-posting provisions of the Alcoholic Beverage Control Act and regulations adopted pursuant thereto.[12]

In an earlier case, in 1978, the California Supreme Court, in *Rice v. Alcoholic Bev. etc. Appeals Board,* 21 Cal.3d 431 (Rice), after having upheld the validity of the minimum consumer price provisions of § 24755 of the Act relating to distilled spirits on at least four previous occasions,[13] reversed its earlier position and declared that section invalid as violating the Sherman Antitrust Act (15 U.S.C. § 1).[14]

In *Rice,* a retailer sold distilled spirits to a consumer at prices less than the minimum prices established and filed with the Department. Basing its decision solely on federal grounds, and referring to the validity of § 24755 insofar as the effect of the Sherman Antitrust Act was concerned, the Court stated that ". . . When a statute enacted pursuant to the Twenty-first Amendment conflicts with an enactment

[12]See Joint Appendix, p. 3.

[13]*Allied Properties v. Department of Alcoholic Beverage Control* (1959) 53 Cal.2d 141, 346 P.2d 737; *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 420 P.2d 735; *Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd.* (1969) 71 Cal.2d 1215, 459 P.2d 667; *Big Boy Liquors, Ltd. v. Alcoholic Bev. etc. Appeals Bd.* (1969) 71 Cal.2d 1226, 459 P.2d 674.

[14]The *Rice* case is set forth in full beginning at Appendix C-1 through C-39 of the Petition for Certiorari herein.

based on the commerce clause, we must balance the policies furthered by each in order to determine which should prevail."[15]

The California Supreme Court concluded, "that the policies underlying the Sherman Act must prevail, and that the price maintenance provisions embodied in section 24755 are invalid."[16]

The California Supreme Court further held that even though the conduct of the brand owners in setting the minimum consumer prices was required by California law, and was enforced by State officials, nevertheless there was no immunity from the Sherman Act under the "state action" exemption. In that connection, the Court stated:

> ". . . Thus, in our view, we would be extending the decisions of the United States Supreme Court beyond their intended design if we were to hold, as the Department urges, that this scheme is immune from the Sherman Act."[17]

The Director of the Department, Baxter Rice, did not seek a writ of certiorari from this Court and the decision became final.

The California Court of Appeal in the instant case determined that a writ of mandate should be issued directing the Department "to refrain from enforcing the fair trade and wine price posting provisions of the Alcoholic Beverage Control Act."[18] In reaching this conclusion, the Court of

[15]Appendix C-22, Pet. for Cert.

[16]Appendix C-39, Pet. for Cert.

[17]Appendix C-18, Pet. for Cert.

[18]Appendix A-10, Pet. for Cert.

Appeal relied upon the California Supreme Court's decision in *Rice,* and indicated that the result in the instant case was compelled by that decision:

> ". . . The California Supreme Court carefully considered whether the California liquor price maintenance scheme was within the state action exception or saved by the Twenty-first Amendment, and concluded that neither exception applied. (*Rice,* supra, 21 Cal.3d at pp. 441-444, 447-457.) *We are bound by that decision.*" (Emphasis added.) (*Midcal Aluminum, Inc. v. Rice,* 90 Cal.App.3d 979, 984, fn. 4.)[19]

Petitioner CRLDA, is a trade association comprised of over 3,000 of the independent retail liquor establishments in California.[20]

Petitioner CRLDA sought and was granted leave to intervene in the proceeding before the California Court of Appeal and has participated in all stages of the proceedings. Following the decision by the Court of Appeal, petitioner CRLDA sought a rehearing which was denied.[21] CRLDA thereafter filed a petition for hearing with the California Supreme Court. That petition was denied, without comment, on May 24, 1979.[22]

Petitioner then applied for and was granted a stay of issuance of the peremptory writ of mandate from the Court of Appeal for the purpose of seeking the issuance of a writ of certiorari from this Court.[23] That stay was extended by the Court of Appeal on June 27, 1979 to July 20, 1979.[24] On July 20, 1979, the Court of Appeal extended the stay "pending further order" of the Court.[25]

[19]Appendix A-7, Pet. for Cert.
[20]Joint Appendix, p. 39.
[21]Joint Appendix, p. 2.
[22]Appendix B, Pet. for Cert.
[23]Appendix G, Pet. for Cert.

The Petition for Writ of Certiorari herein was filed with this Court on July 19, 1979. Certiorari was granted on October 1, 1979.

SUMMARY OF THE ARGUMENT

The States have general police power to regulate matters concerning health, safety, welfare and morals. (Tenth Amendment.) The States have even broader police power in the regulating of liquor[26] within their borders. The "broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals." (*California v. La Rue*, 409 U.S. 109.) Shortly prior to the enactment of the Wilson Act in 1890, this Court, in applying the Commerce Clause, limited the States' traditional police power. (*Leisy v. Hardin*, 135 U.S. 100.) The Wilson Act was intended to remove liquor from those Court-imposed restrictions of the Commerce Clause. (*Clark Distilling Co. v. Wes'n Md. Ry. Co.*, 242 U.S. 311.)

[24]Appendix H, Pet. for Cert.
[25]Joint Appendix, p. 54.
[26]The word "liquor is used throughout this brief unless the context calls for identifying the type of alcoholic beverage involved. California constitutional and statutory provisions use "alcoholic beverages." The Webb-Kenyon Act and the Twenty-first Amendment use "intoxicating liquor." The cases use all three to describe the product.

The Webb-Kenyon Act was enacted in 1913 to expand the limited scope that had been accorded the Wilson Act. (*Clark* case, supra.) That Act's title sets forth with clarity its purpose:

> "An Act Divesting intoxicating liquors of their interstate character in certain cases." (*Clark* case, supra, at p. 321.)

With the passage of the Webb-Kenyon Act, liquor was effectively removed from the restrictions of the Commerce Clause insofar as State regulation within its borders was concerned. (*Clark* case, supra.)

The States' power to regulate liquor within their borders was recognized as continuing throughout the Eighteenth Amendment (Prohibition) era. (*McCormick & Co. v. Brown*, 286 U.S. 131.)

On December 5, 1933, the Twenty-first Amendment was ratified with two basic effects:

(1) The Eighteenth Amendment was repealed, and

(2) The regulation of liquor for "delivery or use" within the State was placed squarely with the States and Congress' power to amend or repeal the effect of the Webb-Kenyon Act was removed. As has been stated by this Court on several occasions, the Webb-Kenyon Act was "constitutionalized." (*Craig v. Boren*, 429 U.S. 190, 205-206.)

Congress reenacted the Webb-Kenyon Act in 1935, thus emphasizing its continued vitality and further bolstering the broad effect of the Twenty-first Amendment. As recently as 1973, in *National Railroad Passenger Corp. v.*

Miller, 358 F.Supp. 1321 (D.C. Kan., 1973), summarily affirmed 414 U.S. 948, the continued existence of Webb-Kenyon was recognized.

Before the ratification of the Twenty-first Amendment, Congress had the power to regulate liquor within a State's borders under the Commerce Clause but for the Webb-Kenyon Act. (See *Clark*, supra; *McCormick*, supra.) Since the Twenty-first Amendment, Congress has no power to enact legislation, under the Commerce Clause, relating to liquor for "delivery or use" within a State where the State has enacted legislation which would either be in conflict with or inconsistent with the Federal legislation. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause. (*Craig v. Boren*, supra; *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35.)

Prior to the Twenty-first Amendment, Congress could have repealed the Webb-Kenyon Act and taken control of the regulation of liquor within the States. The Twenty-first Amendment protects the States' rights to regulate liquor from interference by Congress once the State has undertaken to act. (*Castlewood Intern. Corp. v. Simon*, 596 F.2d 638.)

Under the Twenty-first Amendment, a State has the right to legislate concerning intoxicants brought from without the State for use and sale therein, unfettered by the Commerce Clause. (*Ziffrin, Inc. v. Reeves*, 308 U.S. 132.) A State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of

intoxicants designed for use, distribution, or consumption within its borders. (*Seagram & Sons* case, supra.)

The Sherman Act is a Federal statute enacted under the Commerce Clause, whereas the State statutes and regulations involved in this matter are enactments of the State, based both on the State's general police power and the Twenty-first Amendment. As was said in the *National Railroad Passenger Corp.* case, supra,

> ". . . before a federal law may preempt state legislation, the federal statute must be free from constitutional infirmity. Constitutional amendments limit the power of Congress as well as that of the states when so considered. . . ." (See also concurring opinion of Justice Frankfurter in U.S. v. Frankfort Distillers, 324 U.S. 293.)

As was pointed out in *California v. La Rue,* supra, the previous decisions of this Court ". . . did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations . . ."

If a State statute regulating liquor within its borders is challenged as being in conflict with either the Commerce Clause or Federal statutes enacted thereunder, such as the Sherman Act and the Rail Passenger Service Act, however, the State statute prevails under the Twenty-first Amendment. (*Seagram & Sons v. Hostetter,* supra; *National Railroad Passenger Corp. v. Miller,* supra.)

It has been suggested earlier in this case and in the *Rice* decision that in the case of *Hostetter v. Idlewild Liquor Corp.,* 377 U.S. 324, this Court held that the Commerce

Clause prevailed over the State liquor regulation. That case was decided under the provision in the Commerce Clause that confers upon Congress the power to "regulate commerce with foreign nations" as was pointed out in the *Hostetter* case ". . . this case does not involve measures aimed at preventing diversion or use of alcoholic beverages within New York . . . Rather the state has sought totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do." (*Hostetter v. Idlewild Liquor Corp.,* 377 U.S. 324, 334.)

The only areas where this Court has struck down State regulation in the liquor field were where the State provisions were contrary to other provisions of the Constitution and cases involving exclusive Federal jurisdiction over Federal enclaves such as national parks and military installations. The cases where it was held the statutes were contrary to other constitutional provisions involved violations of the Equal Protection Clause (*Craig v. Boren,* supra, different minimum drinking age for male and female); denial of the fundamental notice and hearing requirement of the Due Process Clause in connection with the public posting of names of persons who had engaged in excessive drinking (*Wisconsin v. Constantineau,* 400 U.S. 433); and violation of the Export-Import Clause (*Department of Rev. v. James Beam Distill. Co.,* 377 U.S. 341, where Kentucky imposed a tax on whiskey imported from Scotland while it remained in the unbroken packages in the hands of the original importer.)

The California Supreme Court in *Rice* in holding that the interests of the State liquor regulation must be "balanced" against the "policy" of the Sherman Act has rendered the Twenty-first Amendment meaningless. Such an interpretation would be contrary to the intention of the people of the United States when they repealed the Eighteenth Amendment, adopted the Twenty-first Amendment, and placed the regulation of liquor within a State's borders in the hands of the State and took away the power from Congress that it had prior to the Twenty-first Amendment, prior to the enactment of the Webb-Kenyon Act, to regulate liquor within a State.

The methods, procedures, restrictions and restraints by which a State determines to regulate liquor under the power granted it by the Twenty-first Amendment, the reserved power it possesses under the Tenth Amendment, its general police power and the "broader" police powers that a State possesses in the field of liquor regulation are all required by judicial precedent, national policy and reason to be left to the best judgment of the several State Legislatures. Although not involving liquor regulation, the recent decision by this Court in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 439 U.S. 96, 111, recognizes this theme in discussing the "anticompetitive effect" of the California statute involved. The Court said:

> "In this sense, there is a conflict between the statute and the central policy of the Sherman Act—'our charter of economic liberty' . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a State statute invalid, the States' power to engage in economic regulation would be effectively destroyed."

The overturning of State regulatory provision under the Fourteenth Amendment as being violative of "substantive due process" has long since been repudiated by this Court as amounting to no more than the substitution of the judgment of the Courts for that of the Legislatures, therefore constituting judicial legislating. (*Ferguson v. Skrupa,* 372 U.S. 726, 729-730.)

In the *Rice* case, the California Supreme Court has simply substituted its concept of public policy and the wisdom of the California regulatory provisions involved for that of the California Legislature, and the result is contrary to the decisions of this Court involving State regulation under the Twenty-first Amendment.

The California regulatory provisions are likewise valid under the "state action" exemption to the Sherman Act. They are part of a comprehensive scheme of State regulation well within the legitimate aims and purposes of the State. (*New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* supra.) The alleged anticompetitive conduct complained of is "required" and "compelled" by the provisions of the statutes and rules involved. (*Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389; *Bates v. State Bar of Arizona,* 433 U.S. 350.) Cf. *Cantor v. Detroit Edison Co.,* 428 U.S. 579, where the alleged anti-competitive behavior was simply "authorized" by the State regulatory provisions and *Schwegmann Bros. v. Calvert Corp.,* 341 U.S. 384, where the statute (Miller-Tydings Act) was held to not even "authorize" the anti-competitive conduct.) The instant action seeks to restrain a public official from enforcing a State law. (*Parker v. Brown,* 317 U.S. 341.) In a word, all

of the criteria established by this Court for immunizing State regulatory provisions from the Sherman Act are present.

Whether the questions presented in this matter be considered in the light of the Twenty-first Amendment alone, whether they be considered in the light of the "state action" exemption alone, or whether the totality of the situation calls for the application of both, the California regulatory provisions are within the State's power to enact under the Twenty-first Amendment, are within the State's general police power and they are within the "state action" exemption to the Sherman Act.

CALIFORNIA'S LEGISLATIVE SCHEME FOR SETTING PRICES FOR ALCOHOLIC BEVERAGES WITHIN ITS BORDERS IS VALID UNDER THE TWENTY-FIRST AMENDMENT AND DOES NOT VIOLATE THE SHERMAN ACT

The basic question in this case is whether the California provisions regulating liquor within its borders violate the Sherman Antitrust Act. A State's power to enact economic regulatory legislation has not been seriously questioned since this Court, in 1934, upheld the New York regulatory scheme which set minimum prices for milk in *Nebbia v. People of the State of New York,* 291 U.S. 502 (1934).

As this Court observed in *Ferguson v. Skrupa,* 372 U.S. 726 (1963):

> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believed the Legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgments of legislative bodies, who are elected to pass laws . . ." (Id. at p. 730.)

The most direct discussion of the State's power to regulate the price of liquor within its borders is found in Justice Frankfurter's concurring opinion in *U.S. v. Frankfort Distilleries,* 324 U.S. 293:

> ". . . If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it. Such State policy cannot offend the Sherman law even though distillers or middlemen agree with local dealers to respect this policy. . . ." (Id., p. 293.)

Since the States possess the power to enact economic regulations and since this Court long ago rejected the proposition "that due process authorizes courts to hold laws unconstitutional when they believe the Legislature has acted unwisely" the only potential impediment to a State enacting legislation regulating price in a field so peculiarly subject to State control is the Sherman Antitrust Act. In fact, in the California courts below, the sole ground for declaring the provisions involved invalid was the Courts' holding they violated the Sherman Act. (See, *Rice*

v. Alcoholic Bev. etc. Appeals Bd. (1978) 21 Cal.3d 431, Appendix to Petition for Cert. C-39; *Midcal Aluminum, Inc. v. Rice,* 90 Cal.App.3d 979, Appendix to Petition for Cert. A-9.)

Without engaging in a general and lengthy legal or philosophical discussion of the relative nature of the legislative powers possessed by the Federal government as opposed to the States, it can be agreed that the source of Congressional power to enact legislation is the United States Constitution, and its power to enact legislation of a regulatory nature generally is based on the Commerce Clause. It also requires no citation of authority to state that Congress' power to enact economic regulation, although based on the Commerce Clause, is limited by other provisions of the Constitution. It is further not open to dispute that a State's police power is generally reserved to it under the Tenth Amendment, and the State, in the exercise of its police power, is likewise subject to the provisions and restrictions of the United States Constitution. However, while a State, in enacting economic regulation under its general police power is generally subject to Constitutional restrictions, in the matter of the regulation of liquor within a State's borders the Twenty-first Amendment has removed that particular commodity from the effect of the Commerce Clause. (*Seagram & Sons v. Hostetter* (1966) 384 U.S. 35; *Craig v. Boren* (1976) 429 U.S. 190.) Thus, the States, while remaining subject to other provisions of the Constitution, are not subject to the Commerce Clause when it comes to regulating liquor within their borders because of the power granted them by the Twenty-first Amendment. (*U.S. v. Frankfort Distilleries,* 324 U.S. 293.)

That Congress, acting under the Commerce Clause, has the power to enact price legislation generally, without running afoul of other constitutional provisions is well illustrated by the extensive Federal regulatory programs involved in price setting for railroads, airlines, and the trucking industry to mention several.

It is also clear that a State, in the exercise of its economic regulatory powers, outside of the Twenty-first Amendment-protected liquor field, is subject to both the Commerce Clause and Congress' power to enact legislation pursuant thereto, such as the Sherman Act.

While the States' power to enact legislation under the Twenty-first Amendment which has an anticompetitive effect, including statutes authorizing "price-fixing", is well established as illustrated by the above quotation from Justice Frankfurter in the *Frankfort Distilleries* case, some question has been raised as to the effect on liquor regulation of the repeal in 1976 of the Miller-Tydings and McGuire Acts (50 Stat. 693 and 66 Stat. 632). (See, *Rice v. Alcoholic Bev. etc. Appeals Bd.,* Appendix Pet. for Cert. C-36.)

In the Miller-Tydings Act, Congress removed fair trade contracts setting minimum prices from the effects of the Sherman Act provided that the State had enacted legislation authorizing such contracts. The McGuire Act was a simple Congressional authorization of State legislation that permitted a non-signer to be bound by a fair trade contract between two other parties.

Before proceeding with a brief discussion of the background of those Acts and their effect, if any, on the present

situation, the Report of the Senate Judiciary Committee at the time that the two Acts were repealed is especially pertinent insofar as it affects state liquor "fair trade" regulation as opposed to general "fair trade" legislation by a state:

> "Liquor will not be affected by the repeal of the fair trade laws in the same manner as other products because the Twenty-First Amendment to the Constitution gives the States broad powers over the sale of alcoholic beverages. Thus while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do so in States which pass price fixing statutes pursuant to the Twenty-First Amendment." (S.R. Rep. No. 466, 94th Cong., 1st Sess., p. 2 (1975); Reprinted in 1975 U.S. Code, Cong. & Admin. News, at pp. 1569, 1571.)

However, outside of the field of liquor regulation the Miller-Tydings and McGuire Acts had been made necessary by two cases from this Court, namely, *Dr. Miles Medical Co. v. Park & Son Co.,* 220 U.S. 373 (1910) and *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384 (1951). (Cf. with *Old Dearborn Co. v. Seagram,* 299 U.S. 183 (1936).)

This Court had pointed out that Congress could eliminate any problems it found to be present in the Court's declaration of invalidity of the fair trade contracts, by legislation:

> ". . . If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress . . ." *Old Dearborn Co. v. Seagram Corp.,* 299 U.S. 183, 191 (1936).

The Miller-Tydings Act was eventually enacted eliminating the effect of earlier court rulings.

In the *Schwegmann* case, supra, which arose after the Miller-Tydings Act had become effective, the question was the validity of a Louisiana *general* fair trade statute. It is particularly significant that the Louisiana statute was a general fair trade statute since the *Schwegmann* case in fact involved liquor distributors. The Louisiana statute contained a provision whereby "nonsigners" were bound by the price-fixing provisions of a fair trade contract entered into by others. The Miller-Tydings Act was silent on the question of the "non-signer." The *Schwegmann* case reviewed the legislative history, noted the absence of any provision authorizing non-signer provisions, and noted that just such a provision had been rejected during the legislative process. This Court simply held that it was not the Congressional intent in the Miller-Tydings Act to authorize the binding of non-signers by a fair trade contract.

On page 384, the Court made the holding of the case clear:

> "In other words, since Congress was writing a law to meet the specifications of State law, it would seem that if the non-signer provision as well as the 'contract' provision of State law were to be written into Federal law, the pattern of the legislation would have been different."

Congressional passage of the McGuire Act authorizing the non-signer provisions followed the *Schwegmann* case and eliminated the effect of the *Schwegmann* case.

An analysis as to the proper role of the *Schwegmann* case, insofar as it might be construed to be a Twenty-first Amendment case rather than a simple interpretation of Congressional intent insofar as general fair trade laws are concerned, is found in the case of *Schwartz v. Kelly,* 99 A.2d 89, 140 Conn. 202 (1953).

At page 93 of the Atlantic Reporter, the Court correctly pointed out:

> "In the second place, the Louisiana Fair Trade Act applied to branded goods of all kinds. The Act now before us applies only to branded intoxicating liquor. The difference is vital. The twenty-first amendment to the United States constitution provides in § 2: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' The effect of this is to override the limitations contained in the commerce clause of the federal constitution insofar as state legislation controlling the importation of intoxicating liquor is concerned. By virtue of the twenty-first amendment the states are free to enact laws prohibiting, restricting or regulating the bringing of intoxicating liquors into their territories completely unfettered by the commerce clause. . . ."

If the *Schwegmann* case had involved a Louisiana Statute, enacted under the Twenty-first Amendment, relating only to liquor, the *Schwegmann* case would be relevant here. However, it is clear that until a State has acted under the Twenty-first Amendment to enact provisions regulating liquor within its borders, Congressional legislation will be effective within the State in regulating commerce. Justice

Frankfurter, again in his concurring opinion in *U. S. v. Frankfort Distilleries,* supra, makes this point clear:

> ". . . Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. . . ."

Justice Frankfurter again emphasizes the source of the States' power and the interrelationships of the Twenty-first Amendment, the Sherman Act and the Commerce Clause, as he continues:

> ". . . Since the Commerce Clause is subordinate to the exercise of State power under the Twenty-first Amendment, the Sherman law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to State power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment. . . ."

The central issues in this case, and the need for review by this Court, were created by the California Supreme Court in its decision in *Rice v. Alcoholic Bev. etc. Appeals Bd.,* supra, and in the instant case where the California Court of Appeal felt "bound" to follow the *Rice* case. In the *Rice* case, there was a failure to correctly analyze the relationship between the Twenty-first Amendment and the Commerce Clause, a failure to analyze the relationship between the Webb-Kenyon and Wilson Acts and the Sherman Act, and a failure to correctly apply the decisions of this Court wherein challenges to State legislation under the Twenty-

of State regulation of liquor as opposed to other articles of commerce; there is a well defined body of judicial precedent by this Court detailing and describing the broad scope of the legislative power possessed by States in regulating liquor within their borders; and the relative status of Federal and State regulation of liquor is spelled out in the cases. The special reasons, justification and need for the exercise of this uniquely-bestowed power on the States have been discussed over and over again by this Court as well as numerous State and Federal courts.

The meaning, force and effect to be given the Twenty-first Amendment since its ratification in 1933 was first discussed in *State Board v. Young's Market Co.,* 299 U.S. 59 (1936), and has been periodically reviewed by this Court in the cases that have followed up to the most recent discussion in the case of *Craig v. Boren,* 429 U.S. 190 (1976).

Until the decision in the *Rice* case and the decision of the Court of Appeal in the instant case, there was no uncertainty in the unbroken string of judicial precedent from this Court defining the States' power under the Twenty-first Amendment. Indeed, until the *Rice* case, the California Supreme Court had no difficulty upholding California's liquor price control scheme. (See cases cited in footnote 13, page 8 of this brief.)

In *Seagram & Sons v. Hostetter,* 384 U.S. 35 (1966), this Court upheld a New York statute that required "price and also that it was in conflict with the Sherman Act. (Id. at p. 45.) The statute is similar to that involved in the instant case in that it requires the posting of the price of liquor from the wholesaler to the retailer with the State Liquor Authority, and requires that the liquor be sold at the price so posted. It does not appear that any serious contention was made that the price posting provisions of the New York act violated the Sherman Act, the thrust being that the "price affirmation" requirement that distillers affirm that the price at which they were selling liquor to New York wholesalers was no higher than the price being charged in any other State was an "unconstitutional burden on interstate commerce" that would be outside the protection of the Twenty-first Amendment since the conduct being regulated could be argued to occur outside of the State of New York. However, it is significant that the Court upheld the statute and in so doing stated:

> ". . . these provisions serve a clear and legitimate interest of New York in the exercise of its constitutional power to regulate the sale of liquor within its borders." (Id., p. 52.)

In the *Seagrams* case, this Court said:

> "Consideration of any State law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'the transportation or importation to any State, Territory or possession of the United States for delivery

as follows:

> "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal State authority over public health, welfare, and morals."

This Court continued:

> "In *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.'" (Id. at p. 114.)

The *National Railroad Passenger Corp. v. Miller* case, 358 F.Supp. 1321 (D.C.Kan. 1973), which was summarily affirmed by this Court at 414 U.S. 948, is particularly significant in this review for at least two reasons:

(1) It held that the Commerce Clause-based Rail Passenger Service Act (Amtrak, 45 U.S.C. § 501 et seq.) had to be interpreted so as to avoid conflict with a Kansas statute enacted under the Twenty-first Amendment, or the federal provision would be "unconstitutional"; and

Appendix to the Petition for Cert. at C-25, the California Supreme Court rejected the holding of the *National Railroad Passenger Corp.* case in the following language:

> "The department's views as to the reach of the Twenty-first Amendment are supported by *National Railroad Passenger Corp. v. Miller* (D.Kan. 1973) 358 F.Supp. 1321, and by dictum in *Washington Brewers Institute v. United States* (9th Cir. 1943) 137 F.2d 964, decided a number of years before *Hostetter*. . . ."

The *National Railroad Passenger Corp.* case, in addition to being an excellent discussion of the Federal/State relationships in the field of liquor regulation and a thorough and careful analysis of the decisions of this Court, furnishes a clear guide as to the power of a State to regulate liquor within its borders as opposed to a statute enacted by Congress under the Commerce Clause. On page 1329, the Court explains:

> "But before a federal law may preempt state legislation, the federal statute must be free from constitutional infirmity. Constitutional amendments limit the power of Congress as well as that of the states when so considered. A construction of 45 U.S.C. § 546(c) [Rail Passenger Act] which would forbid or prevent the enforcement of a state's regulatory liquor law under the guise of classifying the use and sale of liquor-by-the-drink as a 'service,' if so construed, would

lation of the Twenty-First Amendment. A statute will not be given a broad construction if its validity can be saved by a narrower one. *United States v. Walter,* 263 U.S. 15, 44 S.Ct. 10, 68 L.Ed. 137. So here, the word 'services' should not be construed to include the serving of intoxicating liquor within the boundaries of a State in violation of the State's regulatory act. *Otherwise, that part of the congressional act would be unconstitutional.*" (Emphasis added.)

The history of the treatment of liquor by government and the recognition of its unique character is helpful in recognizing the boundaries between the operation of the Commerce Clause and State regulation.

As was pointed out in *Craig v. Boren* (1976) 429 U.S. 190 at page 205:

> ". . . In the *License cases,* 5 How. 504 579 (1847), the Court recognized a broad authority in State governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause."

This freedom from Commerce Clause restrictions enjoyed by the States continued until the 1888/1890 era when two cases by this Court affected the States' power to regulate liquor causing Congress to enact the Wilson Act (27 U.S.C. § 121). Justice Black, dissenting in *Hostetter v. Idlewild* upheld state power over liquor, through *Bowman v. Chicago & N. R. Co.,* 125 U.S. 465 (1888), which Senator Borah said 'wiped out the Taney decision,' to *Leisy v. Hardin,* 135 U.S. 100 (1890), which made the States 'powerless to protect themselves against the importation of liquor into the States.'"

As Justice Brennan, writing the majority opinion in *Craig v. Boren* observed:

> ". . . This led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the State's regulatory role through the passage of the Wilson and Webb-Kenyon Acts. See, e.g., *Clark Distilling Co. v. Western Maryland R. Co.,* 242 U.S. 311 (1917) (upholding Webb-Kenyon Act); *In re Rahrer,* 140 U.S. 545 (1891) (upholding Wilson Act). . . ." (Id at p. 205.)

A clear statement of the proposition that liquor was removed from the Commerce Clause by the Webb-Kenyon Act (27 U.S.C. § 122) is found in its title:

> "An Act divesting intoxicating liquors of their interstate character in certain cases."

The case of *Clark Distilling Co. v. Wes'n Md. Ry. Co.,* 242 U.S. 311 (1917), discusses the background and meaning of both the Wilson and Webb-Kenyon Acts. The *Clark* case is significant since it was decided in 1917 prior to the

Act:

> ". . . has so regulated interstate commerce as to give the State the power to do what it did in enacting the Prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States . . ." (Id. p. 321.)

On the significant question of a State government's power to regulate liquor, the *Clark* Court observed:

> "That government can, consistently with the Due Process Clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open . . ." (Id. at p. 320.)

The objective of the Wilson Act was explained as being to:

> ". . . correct the great evil which was asserted to arise from the right to ship liquor into a State through the channels of interstate commerce and there receive and sell the same in the original package in violation of State prohibitions . . ." (Id. p. 323.)

> commerce when the existing or future State laws forbade *sales* of intoxicants . . ." (Emphasis ours.) (Id. p. 323.)

The Webb-Kenyon Act was necessary, the Court explained, since the Wilson Act was limited in scope and therefore:

> ". . . the right to receive liquor was not affected by the Wilson Act, [and] such *receipt* and the *possession* following from it and the resulting right to *use* remain protected by the Commerce Clause . . ." (Emphasis ours.) (Id. p. 323.)

After considering the impact of the Commerce Clause on State regulation of liquor under the cases necessitating the passage of the Wilson Act, and the cases construing the Wilson Act after its enactment in 1890, the *Clark* Court concluded:

> ". . . there is no room for doubt that it [Webb-Kenyon Act] was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught . . ." (Id. p. 324.)

"The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the State law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that Act was within the power of Congress to adopt, *there is no possible reason for holding that to enforce the prohibitions of the State law would conflict with the Commerce Clause of the Constitution; . . .*" (Emphasis added.) (Id. p. 325.)

It was argued to the *Clark* Court that these powers in the States to enact liquor legislation without regard to the Commerce Clause would cause serious disruptions in the constitutional power of the Congress under the Commerce Clause in connection with the other articles of commerce. The Court responded to that argument:

". . . The want of force and the suggested inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to sub-

it may not, consistently with the guarantees of the Constitution, embrace." (Emphasis added.) (Id. p. 332.)

In the case of *McCormick & Co. v. Brown,* 286 U.S. 131 (1932), decided shortly prior to the ratification of the Twenty-first Amendment in 1933, and during the time that the Eighteenth Amendment was effective, involved the question as to whether or not the Webb-Kenyon Act had been repealed by the Eighteenth Amendment. In holding that the Webb-Kenyon Act continued to have vitality throughout the Prohibition era, the Court stated:

"As the prohibitory legislation of the States may thus continue to have effective operation, there is no reason for denying to the Webb-Kenyon Act its intended application to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the States' valid prohibitions." (Id., p. 141.)

In discussing the effectiveness of State prohibitory laws during Prohibition, the Court upheld their continued validity so long as they were not in conflict with the Eighteenth Amendment, the *McCormick* Court, in reflecting upon the State's police power generally, and implicity recognizing the State's broad power to regulate liquor, stated:

". . . Such laws derive their force not from that Amendment [Eighteenth] but from power originally

Webb-Kenyon Act.

As if to express its concurrence in the Federal-State relationships established by the Webb-Kenyon Act, and to recognize its continued vitality, Congress, in 1935, reenacted the Webb-Kenyon Act in its original form. (27 U.S.C.A. § 122.)

Department of Rev. v. James B. Beam Distill. Co., 377 U.S. 341 (1964) involved the relationship between the Export-Import Clause and the Twenty-first Amendment, and therefore has no particular relevance to the instant case. However, the case does recognize the continued existence of the Wilson and Webb-Kenyon Acts and their significance.

In footnote 7, at page 345, the Court states:

> "Prior to the Eighteenth Amendment Congress passed the Webb-Kenyon Act and the Wilson Act, giving the States a large degree of autonomy in regulating the importation and distribution of intoxicants. Those laws are still in force."

And as recently as 1973, the three-judge court in *National Railroad Passenger Corp. v. Miller*, 358 F.Supp. 1321, summarily affirmed by this Court at 414 U.S. 948, discussed the Webb-Kenyon Act at page 1326 as follows:

> was denied in the case of *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 at page 325 . . ."

The foregoing discussion of the history and source of power for State regulation of liquor is significant in its demonstration of the relationships between Congressional power under the Commerce Clause, and the State's power to regulate liquor under its general police power, the Webb-Kenyon Act and the Twenty-first Amendment.

The California Supreme Court in the *Rice* case did not mention the Webb-Kenyon Act. Petitioner submits that the Webb-Kenyon Act still plays an important role in making the relationships involving the constitutional and statutory provisions easily understood.

In *Craig v. Boren*, supra, this Court recognized that the Twenty-first Amendment expressed the "framers' clear intention of Constitutionalizing the Commerce Clause" framework established under the Webb-Kenyon and Wilson Acts. This Court went on to state that:

> ". . . This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause. See, e.g., *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *Carter v. Virginia*, 321 U.S. 131, 139-140 (1944) (Frankfurter, J., concurring): *Finch & Co. v. McKittrick*, (sp?) 305 U.S. 395, 398 (1939)." (Id., p. 205-206)

Liquor Corp., supra, at 332; c.f. *Department of Revenue v. James Beam Distilling Co.*, 377 U.S. 341 (1964); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938)." (Id. at p. 206.)

This last quoted language from the *Craig* case is taken basically from the case of *Hostetter v. Idlewild Liquor Corp.*, supra, and has been argued to justify the "balancing" test first applied by the California Supreme Court in the *Rice* case. Such reliance by the *Rice* Court and respondent MidCal to support such a reweighing of the legislative propriety in enacting State liquor legislation is not supported by the cases decided by this Court under either the Twenty-first Amendment or the Webb-Kenyon Act.

In analyzing the statement of this Court in *Craig* regarding the effect of the Twenty-first Amendment on the Commerce Clause, it is helpful to consider the context in which the language was used in the *Idlewild* case itself.

In reading the *Idlewild* case, it is important to note that the Commerce Clause not only relates to interstate commerce but also to "*foreign* commerce." The *Idlewild* case involved an attempt by the State of New York to regulate what the Court concluded to be "foreign commerce" at the International Airport relating to the sale to foreign-bound airline passengers of alcoholic beverages intended for use and delivery at the foreign destination. Not surprisingly, the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do."

It is interesting and of some significance in analyzing the power of the States under the Twenty-first Amendment, especially when the challenge is to either the Commerce Clause or a statute enacted under its power, to note that Justices Black and Goldberg dissented from the majority opinion invalidating the New York statute on the grounds that the Twenty-first Amendment conferred upon the States the power to regulate even this commerce which the majority had characterized as "foreign" commerce.

To further demonstrate the context of the discussion in *Idlewild* that the Twenty-first Amendment had "repealed" the Commerce Clause, one need only consider the effect ascribed to such a contention by the Court:

> ". . . If the Commerce Clause had been *pro tanto* 'repealed', then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor . . ." (Id., at p. 332)

The *Idlewild* Court pointed out that in the case of *Jamison & Co. v. Morgenthau,* 307 U.S. 171, "the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the Com-

merce Clause, and hints that Congress has no longer authority to control the importation of these commodities into the United States." (Id. at p. 332)

It is unlikely that anyone would seriously quarrel with the analysis of the *Idlewild* Court with respect to the effect of the Twenty-first Amendment upon the Commerce Clause as described.

This Court in the *Craig* case, supra, in discussing that language from the *Idlewild* case, recognizes that there are instances in which the interests under certain constitutional provisions, Federal/State relationships, and State regulation of liquor, are to be inquired into rather than simply deferring to the State's power to regulate liquor under the Twenty-first Amendment "unfettered by the Commerce Clause." That is implicit in the Court's citation of the two additional cases besides the *Idlewild* case, namely, the *Department of Revenue v. James B. Beam Distilling Co.* and *Collins v. Yosemite Park & Curry Co.* cases.

The *Department of Revenue* case involved a conflict between the Export-Import Clause of the United States Constitution and a State liquor regulation. The *Collins* case involved an attempt by the State of California to impose a liquor regulation within the boundaries of Yosemite National Park. This Court, in the *Idlewild* case, at page 324, explained the *Collins* case thusly:

> ". . . But the Court held that California could not prevent completely the transportation of the liquor across the State's territory for delivery and use in a Federal enclave within it."

The Federal-State relationships under the Commerce Clause and Twenty-first Amendment are perhaps no better illustrated than in the recent case of *Castlewood Intern. Corp. v. Simon,* 596 F.2d 638 (5th Cir., 1979). In *Castlewood,* a regulation of the Bureau of Alcohol, Tobacco & Firearms required a reasonable relationship between a discount on liquor and cost. On the other hand, a Florida statute required no such relationship. The Florida Supreme Court had held that:

> ". . . under Florida law a wholesaler may sell to a retailer on the basis of a discount given at the time of sale and made available to all vendors buying similar quantities, regardless of laid-in costs or the savings attributable to quantity sales." (Id. at p. 641.)

In holding that the State law prevailed over the Federal regulation, and in referring to the Twenty-first Amendment, the Court of Appeals pointed out:

> ". . . That section is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product—intoxicating liquors." (Citing *California v. La Rue,* supra.) (Id. at p. 642.) The Court continued:
>
> "Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme." (Id., at p. 642.)

In *Castlewood,* the government was arguing that the Federal Alcoholic Administration Act (27 U.S.C. § 201 et seq.) pursuant to which the federal regulations challenged were promulgated should prevail due to the Supremacy Clause of the Constitution. The *Castlewood* court pointed out that:

> "Federal laws have prevailed over state regulation of intoxicating liquors in only two circumstances: 1) Where the state regulation was repugnant to overriding national concern with due process and equal protection, and 2) where the state has sought to invade an area of exclusive federal concern, such as federally owned installations, regulation of commerce with foreign nations, and taxation of imports from foreign countries. . . ." (Id., at p. 642.)

In support of this well recognized principle, the Court cites the several leading cases in which the Twenty-first Amendment and constitutional provisions other than the Commerce Clause regulating commerce within a State were involved. In that connection, the Court cited *Wisconsin v. Constantineau,* 400 U.S. 433 (1970) [due process requirement of hearing]; *Craig v. Boren,* 429 U.S. 190 (1976) [classification based upon sex, denial of equal protection]; *Collins v. Yosemite Park & Curry Co.,* 304 U.S. 518 (1938) [State cannot regulate liquor on a federal enclave]; *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964) [foreign commerce]; *Department of Revenue v. James B. Beam Distilling Co.,* 377 U.S. 341 (1964) [Export-Import Clause].

Since the regulatory provisions involved in both the *Rice* case and the instant case are well within the State's power to enact under the Twenty-first Amendment, and

since reason, logic and judicial precedent support the proposition that States should be free to regulate liquor within their borders in the manner chosen by the States "unfettered by the Commerce Clause" and since these regulatory provisions do not run afoul of any other constitutional provision, they are valid and this Court should so rule.

CALIFORNIA'S LEGISLATIVE SCHEME FOR SETTING PRICES FOR ALCOHOLIC BEVERAGES WITHIN ITS BORDERS IS VALID UNDER THE "STATE ACTION" EXEMPTION TO THE SHERMAN ACT

In rejecting the "state action" exemption to the Sherman Act, the California Supreme Court in *Rice* has ruled directly contrary to the holdings of the leading cases of this Court setting forth the parameters of the "state action" exemption.

The determination of the validity of the California regulatory provisions involved are amply supported by the application of the Twenty-first Amendment. However, the situation in the instant case is a classic example of where the "state action" exemption clearly applies to a State regulatory scheme. (Petitioner would suggest that because of the "broader" scope of State police power under the Twenty-first Amendment and the fact that the State's regulatory programs under that same Amendment are "unfettered by the Commerce Clause", that a decision upholding the application of the "state action" exemption in a liquor case may suffer slightly in its precedential value as applied in areas outside of the liquor field.)

In a case decided by this Court after the *Rice* decision, this Court upheld a California statute that allowed a protest to be filed by an existing motor vehicle dealer to the issuance of a new franchise within his territory by an automobile manufacturer. This Court recognized the anticompetitive nature of the California provisions, and that the regulatory scheme was "clearly articulated and affirmatively expressed, [and] designed to displace unfettered business freedom" and was "outside the reach of the antitrust laws under the 'state action' exemption." (*New Motor Vehicles Bd. of Cal. v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 109.)

The "clearly articulated and affirmatively expressed" nature of the California provisions regulating liquor, and in particular those involved in the instant case, cannot be denied. Nor can it be denied that one of the purposes of the California regulations is the "protection of small business." (See *Allied Properties v. Dept. of Alcoholic Beverage Control,* 53 Cal.2d 141; 346 P2d 737.) This Court, in the *Fox* case, recognized that the regulatory act involved in that case "protects the equities of existing dealers by prohibiting automobile manufacturers from adding dealerships to the market areas of its existing franchisees where the effect of such intra-brand competition would be injurious to the existing franchisees and to the public interest." (*New Motor Vehicles Bd. of Cal. v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 102.)

That the California provisions serve a similar purpose in addition to that of promoting temperance is demonstrated by the provisions of § 24749 of the California Alcoholic

Beverage Control Act, wherein it is declared as a matter of legislative policy:

> "It is declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages shall be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination."

The comprehensive and detailed nature of the California regulatory scheme for controlling the sale, distribution, possession and use of liquor in California is described in this brief under the heading STATEMENT OF THE CASE. Suffice it to say that the California scheme is comprehensive, detailed, clearly articulated and affirmatively expressed.

Another comprehensive California regulatory scheme was involved in the case of *Parker v. Brown* (1942) 317 U.S. 341. This case is perhaps the leading case on the question, and upheld the regulatory program against the contention that it violated the Sherman Act. In the marketing program set up by the California Legislature, raisin growers and state officials collectively, through a system of grower-initiated proposals, administrative hearings and grower acceptance

or rejection of the final marketing program, established minimum prices for raisins in the districts in which the growers had first petitioned for and then agreed to the plan. In upholding the California regulatory provisions, this Court held that the anticompetitive program was exempt from the Sherman Act based on the "state action" exemption. A further similarity between the *Parker* case and the instant case is the fact that in *Parker,* as in the instant case, the attempt was made to restrain a state official from performing his duty in enforcing the State law.

It has been suggested that if the alleged anticompetitive behavior is simply "authorized" rather than "required" or "compelled" by the State, that the "state action" exemption would not apply. (*Cantor v. Detroit Edison Co.,* 428 U.S. 579 and *Schwegmann Bros. v. Calvert Corp.,* 341 U.S. 384.)

Since, as pointed out earlier in this brief, the *Schwegmann* case involved liquor distributors, and therefore it has been suggested that the case might be construed as a Twenty-first Amendment case for the reasons given heretofore, such was not the case. Additionally, the *Schwegmann* case is also not a "state action" case since the question in the case, as discussed in the preceding section of this brief, was not whether the conduct was "authorized", but whether or not the Miller-Tydings Act had legalized "non-signer" provisions at all.

Since the *Fox* case, there would seem to be no question as to the validity of the California provisions involved in this matter insofar as their validity under the "state action" exemption is concerned, if indeed there ever was.

In view of the comprehensive nature of the California regulatory scheme, the fact that the subject of the regulation is liquor, and that the alleged anticompetitive behavior is "required" by the provisions involved, no useful purpose would appear to be served by a detailed analysis of the several cases involving the "state action" exemption. However, Petitioner would respectfully refer this Court to its Petition for Writ of Certiorari herein, beginning at page 22 for a more detailed analysis of the applicable cases.

It is doubtful that a more persuasive case for the application of the "state action" exemption could be made than under the facts and the statutory provisions involved in this case. We would therefore respectfully urge this Court to not only hold the California provisions valid under the Twenty-first Amendment, but under the "state action" exemption as well.

CONCLUSION

For all of the foregoing reasons, this Court should hold the California regulatory provisions to be valid.

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Appendix Follows

APPENDIX

APPENDIX

STATUTES INVOLVED

United States Constitution, Article I, § 8, cl. 3 (Commerce Clause)

§ 8. The Congress shall have Power[:]

[cl 3] To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

United States Constitution:

Twenty-first Amendment, Sections 1 and 2

Amendment 21

§ 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

§ 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

California Constitution:

Article XX, Section 22

§ 22. [Alcoholic beverages control]

The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall

have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages. In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages.

All alcoholic beverages may be bought, sold, served, consumed and otherwise disposed of in premises which shall be licensed as provided by the Legislature. In providing for the licensing of premises, the Legislature may provide for the issuance of, among other licenses, licenses for the following types of premises where the alcoholic beverages specified in the licenses may be sold and served for consumption upon the premises:

(a) For bona fide public eating places, as defined by the Legislature.

(b) For public premises in which food shall not be sold or served as in a bona fide public eating place, but upon which premises the Legislature may permit the sale or service of food products incidental to the sale and service of alcoholic beverages. No person under the age of 21 years shall be permitted to enter and remain in any such premises without lawful business therein.

(c) For public premises for the sale and service of beers alone.

(d) Under such conditions as the Legislature may impose, for railroad dining or club cars, passenger

ships, common carriers by air, and bona fide clubs after such clubs have been lawfully operated for not less than one year.

The sale, furnishing, giving, or causing to be sold, furnished, or giving away of any alcoholic beverage to any person under the age of 21 years is hereby prohibited, and no person shall sell, furnish, give, or cause to be sold, furnished, or given away any alcoholic beverage to any person under the age of 21 years, and no person under the age of 21 years shall purchase any alcoholic beverage.

The Director of Alcoholic Beverage Control shall be the head of the Department of Alcoholic Beverage Control, shall be appointed by the Governor subject to confirmation by a majority vote of all of the members elected to the Senate, and shall serve at the pleasure of the Governor. The director may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove the director from office for dereliction of duty or corruption or incompetency. The director may appoint three persons who shall be exempt from civil service, in addition to the person he is authorized to appoint by Section 4 of Article XXIV.

The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to

deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State.

The Alcoholic Beverage Control Appeals Board shall consist of three members appointed by the Governor, subject to confirmation by a majority vote of all of the members elected to the Senate. Each member, at the time of his initial appointment, shall be a resident of a different county from the one in which either of the other members resides. The members of the board may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove any member from office for dereliction of duty or corruption or incompetency.

When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature. In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of

the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order.

A concurrent resolution for the removal of either the director or any member of the board may be introduced in the Legislature only if five Members of the Senate, or 10 Members of the Assembly, join as authors.

Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of alcoholic beverages in bona fide

hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and in bona fide clubs after such clubs have been lawfully operated for not less than one year, and the privilege of keeping, buying, selling, serving, and otherwise disposing of beers on any premises open to the general public shall be licensed and regulated under the applicable provisions of the Alcoholic Beverage Control Act, insofar as the same are not inconsistent with the provisions hereof, and excepting that the license fee to be charged bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and any bona fide clubs after such clubs have been lawfully operated for not less than one year, for the privilege of keeping, buying, selling, or otherwise disposing of alcoholic beverages, shall be the amounts prescribed as of the operative date hereof, subject to the power of the Legislature to change such fees.

The State Board of Equalization shall assess and collect such excise taxes as are or may be imposed by the Legislature on account of the manufacture, importation and sale of alcoholic beverages in this State.

The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of alcoholic beverages contained in the original packages, where such alcoholic beverages are not to be consumed on the premises where sold; and may provide for the issuance of all types of licenses necessary to carry on the activities referred to in the first paragraph of this section, including, but not limited to, licenses necessary for the

manufacture, production, processing, importation, exportation, transportation, wholesaling, distribution, and sale of any and all kinds of alcoholic beverages.

The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper.

All constitutional provisions and laws inconsistent with the provisions hereof are hereby repealed.

The provisions of this section shall be self-executing, but nothing herein shall prohibit the Legislature from enacting laws implementing and not inconsistent with such provisions.

California Administrative Code, Title 4

Rule 101 (a) (b)

101. Wine Price Schedules. (a) Selling and Resale Prices. (1) No licensee licensed to sell wine to retailers for resale shall so sell, and no retailer shall buy, any package or item of wine at a price other than the effective price established in a "wine resale and/or selling price schedule" and fair trade contract duly filed with the department.

(2) No licensee licensed to sell wine to consumers for consumption off the premises where sold shall so sell any package or item of wine at a price less than the effective minimum retail price of such package or item set forth in a "wine resale and/or selling price sched-

ule" and fair trade contract duly filed with the department, unless written permission is granted by the department.

(b) Posting of Prices. (1) Every licensed owner, or person in control of a brand, trademark or name appearing on a package or item of wine which is to be sold for consumption off the licensed premises in California, must file with the department a "wine resale and/or selling price schedule" containing the minimum bottle prices to consumers for every item carrying that brand, trademark or name. Prices so posted shall be minimum prices, and may differ for the different trading areas within this State.

A retail licensee who owns or controls a brand, trademark or name appearing on a package or item of wine, and who is required to post selling prices to consumers as required by Section 24868, may authorize the wholesaler, winegrower, wine rectifier or rectifier who posts case prices to retailers on such item or items to post the minimum bottle prices to consumers by filing written authorization with the department.

(2) Every licensed owner or person in control of a brand, trademark or name appearing on a package or item of wine which is to be sold to retailers for resale must file with the department a fair trade contract with each class of licensee to whom the wine will be sold or resold (for example, wholesalers and retailers), accompanied by a brand schedule setting forth in detail with respect to each brand owned or controlled, the brand name, secondary brand name and form of label,

and must file with the department a "wine resale and/or selling price schedule" containing the specified or minimum basic case prices to retailers for each item of wine carrying that brand, trademark or name. Prices so posted shall be specified prices in the Northern and Southern Trading Areas, and minimum prices in the Mountain Trading Area, and different prices may be posted for each of the respective trading areas. Prices posted may be f.o.b. selling premises or delivered or both.

15 U.S.C. §§ 1, 2 (Sherman Act)

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceed-

ing three years, or by both said punishments, in the discretion of the court.

27 U.S.C. § 122 (Webb-Kenyon Act)

§ 122. Shipments into states for possession or sale in violation of state law. The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited. (Mar. 1, 1913, c. 90, 37 Stat. 699; Aug. 27, 1935, c. 740, § 202 (b), 49 Stat. 877.)

Alcoholic Beverage Control Act:

(California Business & Professions Code, § 24862)

24862. Compliance with price schedules and fair trade contracts.

No licensee shall in this state sell or resell to a retailer, and no retailer shall in this state buy any item

of wine except at the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 of this division, unless otherwise provided in this chapter.

No licensee in this state shall sell or resell to a consumer any item of wine at less than the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 (commencing with Section 24749) of this division unless otherwise provided in this chapter.

Wine sold pursuant to a bona fide order accepted on the last business day of any month may be delivered to the purchaser, at the price in effect during said month, within two business days immediately following the last day of the month in which the sale was made.

Alcoholic Beverage Control Act:

(California Business & Professions Code, § 24866)

24866. Price schedules and fair trade contracts: Growers, wholesalers, and rectifiers.

Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.

Alcoholic Beverage Control Act:

(California Business & Professions Code, § 24755)

This section is set forth in part insofar as it is relevant in this proceeding in footnote 1, appendix C-2 and 3 of the Petition for Writ of Certiorari filed herein.